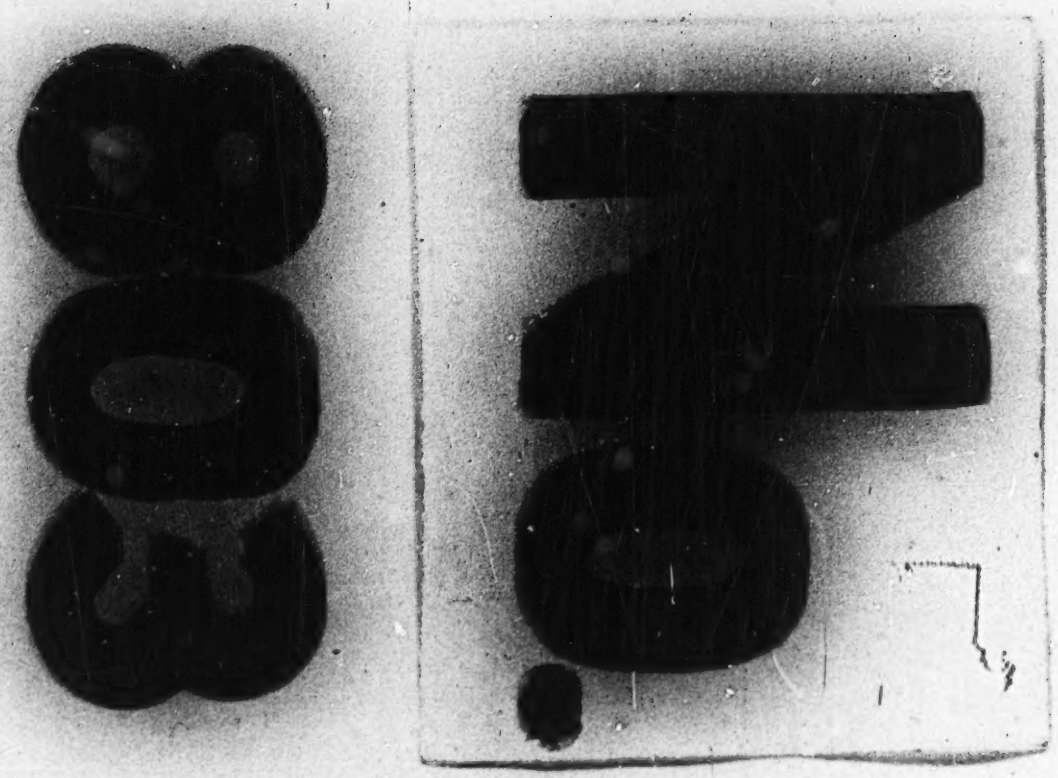

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No. 803

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

v.

D. D. HARRINGTON, ET AL,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID T. SEARLS
GENE M. WOODFIN
Attorneys for Respondents

J. EVANS ATTWELL
VINSON, ELKINS, WEEMS & SEARLS
Esperson Building
Houston, Texas
Of Counsel

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To The Honorable Supreme Court of the United States:

Now come D. D. Harrington, et al ("Respondents"), and file this their reply to the Petition for Writ of Certiorari previously submitted by Natural Gas Pipeline Company of America. For the purpose of brevity, the Petitioner will be referred to as "Natural."

QUESTIONS PRESENTED BY THE REPLY

1. Whether Petitioner's claim for additional interest is foreclosed by the fundamental principles underlying the equitable remedy of restitution established by this Court

in *Atlantic Coastline R. R. Co.* v. *State of Florida*, 295 U.S. 301, which permit a Court in Equity, in the exercise of its discretion, to award or deny interest according to the justice of the case.

2. Whether Respondents' liability to make restitution includes a duty to pay interest on the award for a period prior to the time they breached their duty to make restitution.

STATEMENT OF THE CASE

Respondents entered into a gas purchase contract with Natural effective December 1, 1946, whereby Respondents agreed to deliver a stated quantity of gas to be produced from certain described gas reserves in the Guymon-Hugoton Field in Oklahoma, and Natural agreed to pay for each 1,000 cubic feet of gas delivered, a base price of 6¢ until July 1, 1951, and for the five years thereafter, 7¢ (T. 42-47). On December 9, 1946, the Oklahoma Corporation Commission fixed a minimum price of 7¢ for all gas removed from the Guymon-Hugoton Field (Order 19514) (T. 22, 23). Natural superseded this order by posting bond and made no payment thereunder (T. 23, 24). The validity of this minimum price order was upheld by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 175 (1950).

A second minimum price order (No. 26096) fixing a minimum price of 9.8262¢, was issued by the Oklahoma Corporation Commission on July 29, 1952 (T. 48, 49). Natural did not avail itself of the opportunity to file a supersedeas bond without surety, but notified Respondents that it would pay the minimum price and that all payments in excess of the contract price were being made under protest (T. 8-10, 25). Natural commenced to pay in accordance with the minimum price order but initiated an appeal therefrom. In

Natural Gas Pipeline Co. of America v. *Corporation Commission of Oklahoma*, 272 P. 2d 425 (April 27, 1954), the Supreme Court of Oklahoma upheld the order but upon appeal to this Court the order was held invalid, 349 U.S. 44 (April 11, 1955), as a result of the decision in *Phillips Petroleum Co.* v. *Wisconsin, et al*, 347 U.S. 672 (June 7, 1954).

Natural brought suit to recover by way of restitution, the difference, for the period from August, 1952, to June, 1954, inclusive, between the amount actually paid by it for gas delivered by Respondents referrable to the contract of December 1, 1946, and the amount which would have been paid on the basis of the prices fixed by the contract, with interest at 6% (T. 1). The aggregate contract price for the entire period was $2,827,656.48, and the aggregate amount paid under the order was $4,451,426.71, a difference of $1,623,770.23. On March 22, 1956, the Honorable Joe E. Estes, United States District Judge for the Northern District of Texas, entered summary judgment in favor of Natural against the Respondents for the sum of $1,302,491.23. This award allowed countervailing equities to the extent of $321,279.00, being $237,000.00 paid by Respondents as increased royalties and $84,279.00 paid as increased gross production taxes under the second order (T. 134, 135). Furthermore, Judge Estes found that it was just and equitable to refuse interest on the amount awarded (T. 134, 135).

On July 9, 1957, the United States Court of Appeals for the Fifth Circuit affirmed the award of the District Court, but disallowed the countervailing equities in the amount of $321,279.00 allowed by the District Court, and rendered judgment in favor of Natural against the Respondents for the sum of $1,623,770.23. The Court of Appeals also reversed the District Court's denial of interest and awarded

Natural interest at 6% per annum from April 11, 1955, on all amounts remaining unpaid down to the date of payment.

Respondents' Petition for Rehearing was overruled by the Court of Appeals on January 9, 1958. Despite the fact that the Court of Appeals had disallowed the countervailing equities allowed Respondents by the District Court and had reversed the District Court's denial of interest, Natural filed its Petition for Writ of Certiorari in this Court on February 24, 1958, complaining that in this equitable action for restitution it was entitled to additional interest, as a matter of law, for the period prior to April 11, 1955.

REASONS FOR DENYING THE WRIT

Since Respondents intend to file a Petition for Writ of Certiorari concerning the entire judgment rendered below, they hesitate to oppose Natural's Petition for Certiorari on the question of additional interest. However, because Respondents believe that the questions involved in Natural's petition are foreclosed by the decisions of this Court and the fundamental principles underlying the equitable remedy of restitution, they have submitted this brief in opposition to Natural's petition, but do not intend to waive, limit or in any way prejudice their request for a review of the entire judgment.

I.

The recovery in this case is predicated on the equitable remedy of restitution which is a derivative of the broader action for "money had and received." One of the landmark cases in the law of restitution is *Atlantic Coastline R. R. Co.* v. *State of Florida*, 295 U.S. (1935), where freight charges were collected by a railroad carrier pursuant to an order of the Interstate Commerce Commission after the refusal

of the United States District Court to declare the order void. Later, the decree of the District Court was reversed by the Supreme Court and it held that the order of the Interstate Commerce Commission was invalid. At a subsequent date, some years later, the Interstate Commerce Commission on new findings entered the same order and this time the Supreme Court sustained the order. In the meantime, various shippers petitioned the District Court for restitution to the extent of the difference between the rates that had been paid under the first order which was invalid. They were denied restitution. Mr. Justice Cordoza, writing for the Court, held:

> "Decisions of this court have given recognition to the rules as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. *Arkadelphia Mill. Co.* v. *St. Louis S.W.R. Co., supra; Northwestern Fuel Co.* v. *Brock*, 139 U.S. 216, 35 L. Ed. 151, 11 S. Ct. 523; Ex parte Lincoln Gas & E. L. Co., 257 U.S. 6, 66 L. Ed. 101, 42 S. Ct. 2; cf. *Haebler* v. *Myers*, 132 N.Y. 363. 30 N.E. 936, 15 L.R.A. 588, 28 Am. St. Rep. 589. Indeed, the concept of compulsion has been extended to cases where the error of the decree was one of inaction rather than action, as where a court has failed to set aside the order of a commission or other administrative body, the constraint of the order being imputed in such circumstances to the refusal of the court to supply a corrective remedy. *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 73 L. Ed. 954, 49 S. Ct. 492, *supra*. But the rule, even though general in its application, is not without exceptions. A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. (Citing cases.) The claimant to prevail must show that the money was received in such circumstances

that the possessor will give offense to equity and good conscience if permitted to retain it. (Citing cases.) *The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it.*

* * * * *

"Suits for restitution upon the reversal of a judgment have been subjected to the empire of that principle like suits for restitution generally. '*Restitution is not of mere right. It is ex gratia resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip.*' (Citing cases.) 'In such cases the simple but comprehensive question is *whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.*'" (Emphasis supplied.)

Thus, the touchstone of the equitable remedy of restitution is the discretion of a court in equity to render its judgment according to the justice of the case. The application of this fundamental principle of restitution to the question of interest was clearly stated by Mr. Justice Frankfurter in *Jackson County* v. *United States*, 308 U.S. 343 (1940):

"Assuming, however, that the laws as to interest in government actions based upon quasi-contractual obligations be applicable, the United States must fail here. *The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be unequitable.* *United States* v. *Sanborn*, 135 U.S. 271, 281, 34 L. Ed. 112, 115, 10 S. Ct. 812; *Billings* v. *United States*, 232 U.S. 261, 58 L. Ed. 596, 34 S. Ct. 421." (Emphasis supplied.)

Here, the record is clear that Natural did not have to make any payments pursuant to the Oklahoma minimum price law. It could have superseded the operation of the order and kept the use of the money by filing a mere corporate undertaking without surety or penal amount as did Northern Natural Gas Company (T. 135). Another factor which cannot be overlooked is that during most of the period in question, Natural has been able to recoup the excess payments it made by increased rates to its customers, so that it has not in fact been deprived of the use of the money (T. 135). Additionally, Respondents were required to pay an aggregate of $321,279 in increased royalties and production taxes on the basis of the payments made by Natural under the second Oklahoma minimum price law in order to protect and preserve the leaseholds dedicated under the contract with Natural (T. 125, 134). Such payments inured to Natural's benefit and the trial court held that equity prevented restitution of this sum (T. 134). The Court below possessed the power to mold its decree in light of all the surrounding facts and circumstances, particularly in an action for restitution where the Court's judgment is purely discretionary, and the factors enumerated above form substantial support for the Court's discretionary refusal to award Natural the additional interest sought herein.

II.

Although restitution is an equitable remedy and governed by equitable principles, Natural has sought to impose a rigid legal formula in regard to the granting of interest on any amounts awarded as restitution. However, even if it is assumed that interest follows an award in an action for restitution, as a matter of law, Natural is not entitled to recover the additional interest sought herein because

Respondents were under no duty to pay interest until they committed a breach of duty in failing to make restitution, i.e., April 11, 1955, when this Court determined that the Oklahoma minimum price law was invalid in *Natural Gas Pipeline Company of America* v. *Panoma Corp.*, 349 U.S. 44 (1955). See Restatement of Restitution, Section 156(b).

CONCLUSION

There is no basis for Natural's claim to additional interest. This Court has decided that restitution is a matter of discretion which should be exercised according to the justice of the case. *Atlantic Coastline R.R. Co.* v. *State of Florida, supra; Jackson County* v. *United States, supra.* And when there is a substantial basis supporting the exercise of this discretion, it should not be overtuned. In any event, Respondents were not under a duty to pay interest prior to the time their obligation to make restitution arose.

For these reasons, it is submitted that Natural's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID T. SEARLS
GENE M. WOODFIN
Attorneys for Respondents

J. EVANS ATTWELL
VINSON, ELKINS, WEEMS & SEARLS
Esperson Building
Houston, Texas
Of Counsel

PROOF OF SERVICE

I, DAVID T. SEARLS, one of the attorneys for Respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1958, I served copies of the foregoing Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, on Petitioner, Natural Gas Pipeline Company of America.

.....

DAVID T. SEARLS